IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION Nos.6796 & 6804 of 1991
with
CIVIL APPLICATION Nos.10661 & 10660 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NAGKUNVERBA BALVANTSINH THROUGH HER P.A MANSINH M ATALIA - Petitioner(s)
Versus
PARTHIVBHAI LOMESHPRASAD & 6 - Respondent(s)

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Appearance :
MR JITENDRA M PATEL for Petitioner(s) : 1,
None for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5
MR AM VOHORA for Respondent(s) : 2 - 7.
MR LR PATHAN for Respondent(s) : 2 - 7.
MR MA SAPA for Respondent(s) : 2 - 7.

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 07/10/2006

COMMON ORAL JUDGMENT

1. As all the matters are inter-connected and common questions arise for consideration, they are being considered by this common judgement.

2. The short facts of the case are that one Mohmed Albha was holding the land situated in the sim of Village Kanbha somewhere in the year 1945. The said Mohmed Albha mortgaged the land with one Dr.Lomeshprasad Desai. The said Dr.Lomeshprasad Desai gave the very land on lease basis for cultivation to Mohmed Albha. Thereafter, as Mohmed Albha was in arrears of the rent, Dr.Lomeshprasad Desai commenced the proceedings under Section 21 read with Section 14 of Bombay Tenancy and Agriculture Land Act (hereinafter referred to as “the Act” for short) for recovery of the possession of the land. It appears that on 12.9.1956, ultimately the order was passed by the Bombay Revenue Tribunal, confirming the order for giving possession to Dr.Desai in the revision proceedings No.2812 of 1956. Thereafter, on 12.3.1957, Dr.Lomeshprasad Desai obtained actual possession of the land in question from Mohmed Albha and as per the petitioner, Dr.Lomeshprasad Desai continued to be in possession up to 1962. However, in the year 1963, as per the petitioner, Dr.Lomeshprasad Desai inducted the petitioner as the tenant of the land in

question. In the meantime, Dr.Lomeshprasad Desai filed Civil Suit No.41/1955 against Mohmed Albha and others for recovery of the dues and on 20.10.1961 the decree was passed in the said suit and as per the said decree of the Civil Court, Mohmed Albha and other co-defendants were directed to pay Rs.16,998/- to Dr.Lomeshprasad Desai. The execution application for recovery of amount was also filed by Dr.Desai - respondent No.1 herein.

3. It appears that in the meantime, the widow of one Bhaiba Sathi filed Civil Suit in the Court of learned Civil Judge, Karjan in the year 1959 for declaration to the extent of her share in the property which was mortgaged by Mohmed Albha in favour of respondent No.1 – Dr.Desai. The said suit was transferred to the Court of Jt. Civil Judge and it was re-numbered as Civil Suit No.44 of 1961. In the said suit, respondent No.1 as well as Mohmed Albha were parties, but as per the petitioner, they were not impleaded as parties. The said suit was decreed in favour of Bhaiba Sathi and others as co-owner and it was declared by the Court that the mortgage created by Mohmed Albha in favour of respondent No.1 was binding to the extent of share of Mohmed Albha and was not binding qua the share of Bhaiba Sathi and others.

4. In the year 1964, Bhaiba Sathi, as got her share in the property, filed the application under Section 84 of the Tenancy Act against the present petitioners on the ground that they were in unauthorised possession of the land. The Prant Officer had passed the order of eviction against the petitioner. The matters were carried before the Tribunal in revision and ultimately as per the decision dated 25.1.1966, the Tribunal allowed the revision. It appears that thereafter the matters were carried before this Court being SCA Nos.904 to 907 of 1966 and in the said petitions, this Court (Coram: D.A.Desai, J. - as he then was) vide order dated 11.8.1970 observed, inter alia, as under:

> *" In the present petitions, the respondents raised a specific contention that they are tenants of the land. That contention has not been decided by the Prant Officer at all and by necessary implication it has been negatived when the Prant Officer passed an order for summary eviction. Therefore, the Prant Officer committed a serious error apparent on record by not considering the question raised by the respondents. The moment his attention was focused on that point, it would have been clear to him that he had no jurisdiction to decide that question. The Tribunal in its turn did*

not focus its attention on this point. The Tribunal allowed the petitions preferred by the respondents on the ground that complicated questions of title are raised and they should not have been disposed of in a summary inquiry under Section 84. That approach, in my opinion, is hardly satisfactory. The Tribunal should not have proceeded to dismiss the applications filed by the petitioners under Section 84 but should have directed the prant officer to stay off his hands and direct the respondents to get their status determined by the Mamlatdar under Section 70(b) of the Bombay Tenancy Act. As these petitions are being allowed only on the question of jurisdiction which in my opinion goes to the root of the matter, other contentions between the parties are kept open.

Accordingly, all these petitions are allowed and the order made by the Tribunal in each of the applications before it and the order of the Prant Officer in each of the applications filed by the present petitioner is quashed and set aside and the cases are remanded to the Prant Officer with a direction that the case should be retained on the file of the Prant Officer and the Prant Officer should direct the opponents in each came before him to

get his status as tenant decided by the Mamlatdar under Section 70(b) of the Bombay Tenancy Act. Rule made absolute to the extent indicated above with no order as to costs. ”

5. It is not in dispute that after the order passed by this Court referred to hereinabove neither the Prant Officer directed, nor the Opponents therein who are petitioners herein approached the Mamlatdar for declaration of their status as tenant by making application under Section 70(b) of the Act. However, it appears that somewhere in the year 1974-75 on the basis of the revenue record, the Mamlatdar and ALT initiated suo mottu proceedings being Tenancy Case No.795/74-363/1975 under Section 32(g) of the Act and while examining the matter the Mamlatdar and ALT found that there is an earlier direction of this Court dated 11.8.1974 for making application under Section 70(b) and to get the decision for status as tenant of the land in question and, therefore, on 30th September, 1978 the Mamlatdar passed the order, whereby the Mamlatdar observed that until the claim is made under Section 70(b) of the Act for declaration of the status as tenant and until the said aspect is decided, no further order is required to be passed and, therefore, the proceedings were closed. It appears that the petitioners preferred appeals being Appeal Nos.4/80 and 5/80 before the

Dy. Collector against the order of the Mamlatdar and in the proceedings of the appeal the Dy. Collector (Tenancy Appeals) ultimately on 1.11.1985 passed the order and observed that while examining the matter under Section 32G the Mamlatdar and ALT could also examine the question of status as tenant under Section 70(b) of the Act and, therefore, the Dy. Collector allowed the appeal and directed the Mamlatdar to decide the status of the appellant as that of tenant or not under Section 70(b) of the Act and thereafter if the status is declared as that of the tenant then he further ordered for fixation of the price. It appears that the matters were further carried by the petitioners herein before the Gujarat Revenue Tribunal in the proceedings of the revisions being Nos.97 and 98 of 1986. The Tribunal as per the decision dated 22.11.1989 found that the direction given by this Court in the judgement delivered in SCA Nos.904 and 905 of 1996 are binding to both the sides and, therefore, it cannot be said that the order passed by the Dy. Collector in appeal is against the provisions of law, nor can it be argued that since the application under Section 32G of the Act was being considered, it is not necessary to decide the status of the appellant as tenant under Section 70(b) of the Act. It was observed by the Tribunal that the applicants are bound by the

judgement in SCA Nos.904 to 907 of the 1966. Therefore, ultimately the Tribunal found no case for interference and hence, the revisions were dismissed. It is under these circumstances, the petitioners have preferred these petitions before this Court.

6. I have heard Mr.J.M.Patel with Mr.Chauhan, learned Counsel for the petitioners and Mr.Pathan with Mr.Sapa, learned Counsel for respondents No.2 to 7. Respondent No.1/1 to 1/5, though served, have chosen not to appear or defend the proceedings.

7. As such in view of the earlier judgement of this Court in SCA Nos.904 to 907 of 1966 and more particularly the directions reproduced hereinabove, it was required for the Prant Officer to direct the Opponent to get their status decided as tenant. At the same time, in view of the direction given by this Court, it was also required for the Opponents therein, who are petitioners herein to get their status decided as that of the tenant by the Mamlatdar under Section 70(b) of the Act. As neither the Prant Officer has directed, nor the petitioners themselves have moved the application under Section 70(b) of the Act to the Mamlatdar, such contingencies did not arise, but any inaction on the part of the Prant Officer or on the part of

the petitioners cannot be terms as totally nullifying the binding effect of the directions given by this Court. Therefore, as such even if the contention raised on behalf of the petitioners by Mr.Patel is accepted that the Mamlatdar, while exercising the power under Section 32G of the Act has also power to decide the question of the status of the petitioners as that of the tenant, in view of the decision of this Court in case of "**Kalabhai (since decd.) through his heirs Shantaben Kalabhai & Ors. v. Taraben Widow of Gordhanbhai Mangalbhai & Ors.", reported in 1991(1) GLR, 118, then also it would be required for the Mamlatdar and ALT to consider the matter under Section 70(b) of the Act to decide the question of status of the petitioners as that of the tenant.** The Dy. Collector as well as the Tribunal have rightly observed that such aspects deserve to be examined under Section 70(b) by the Mamlatdar and, therefore, discretion is rightly exercised by the Dy. Collector while exercising the appellate power and the Tribunal has rightly not interfered with the order passed by the Dy. Collector of remanding the matter to the Mamlatdar.

8. The scope of judicial review by this Court in petition under Article of the Constitution of India against the order passed by the lower quasi

authority or the Tribunal is limited to the error apparent on the face of record or of the jurisdictional error or perversity in exercise of the power on the face of it. If the legality and validity of the orders passed by the Dy. Collector and its confirmation thereof by the Tribunal are examined keeping in view the aforesaid scope and ambit of the power to be exercised by this Court under Article 227 of the Constitution of India, it cannot be said that the lower authorities have committed any jurisdictional error or there is any error apparent on the face of record or there is any perversity in exercise of power and, therefore, as such it is not a case for interference with the decision of the Dy. Collector while exercising the appellate jurisdiction and the decision of the Tribunal not interfering with the decision of the Dy. Collector in appeal.

9. The attempt on the part of Mr.Patel, learned Counsel appearing for the petitioners was to contend that when all material was there on record before the Dy. Collector as well as before the Tribunal it was required for the lower authority to examine the status of the petitioner as that of the tenant and ought to have decided the matter itself under Section 32G of the Act. He further submitted that

as the lower authorities have not considered the aforesaid aspect of examining the status, this Court in the present petitions may also examine the said aspects and may finalize the question on the status of the petitioner as that of the tenant of the land in question. Mr.Patel in support of his argument further submitted that the petitioner is a tenant inducted by the mortgagee in possession of the land in question and, therefore, irrespective of the terms of the contract of mortgage between the landlord mortgagor and the mortgagee, the one who is cultivating the land is entitled to claim the status as that of the tenant and the attempt on the part of Mr.Patel was to contend that in view of the decision of the Apex Court in case of **"Dahya Lala and Ors. v. Rasul Mahomed Abdul Rahim and Ors.", reported in AIR 1964 SC, 1320** the petitioner was entitled to claim the status as that of the tenant and he further submitted that the aforesaid decision is subsequently once again reiterated by the Apex Court in case of **"Papila Bai v. Chavdas T. Bhortakke (Dead) by LRs and Ors.", reported in 2005(2) GLR, 1470** observing that the earlier view of the Apex Court in case of **"Dahya Lala and Ors. v. Rasul Mahomed Abdul Rahim and Ors."** (Supra) still holds the field and, therefore, Mr.Patel submitted

that as per the aforesaid both the decisions of the Apex Court, the petitioners can be termed as tenants of the land in question, entitled to the benefit of the Act and consequently entitled to purchase the land as per Section 32G of the Act. Mr.Patel, learned Counsel appearing for the petitioners also relied upon the decision of the Apex Court in case of **"Bechan Pandey and Ors. v. Dulhin Janki Devi and Ors.", reported in AIR 1976 SC, 866** and the decision of the Apex Court in case of **"Aswinkumar K. Patel v. Upendra J. Patel", reported in 1999(1) GLH, 1052** for contending that the power of remand should not ordinarily to be exercised when all the material is available on record and the Court is in a position to decide the matter.

10. Mr.Pathan, learned Counsel appearing for the contesting respondents, however, submitted that by a decree of the Civil Court, the relationship of Respondent No.1 with Mohmed Albha had ceased as mortgagee and mortgagor and he submitted that the said suit was filed in the year 1955 and the decree was passed in the year 1965, whereas the petitioners are said to have been inducted in

the year 1963 by Respondent No.1. He further submitted that so far as the rights of widow of Bhaiba Sathi is concerned, she initiated the proceedings on 31.1.1959 for declaration of her share in the property and the said suit is ultimately decreed in her favour and mortgage to the extent of the share of Bhaiba Sathi and other co-owner is held as not binding to Bhaiba Sathi and other co-owner, who were plaintiffs in the said suit and the decree is based on a later date, but as per the contention of Mr.Pathan after the institution of the suit filed by Bhaiba Sathi in the year 1959 with a view to frustrate the proceedings of the suit, Respondent No.1 has inducted the petitioners over the land in question. He submitted that as per the decree passed against Mohmed Albha in the suit preferred by Respondent No.1 as on 20th October, 1956 the relationship as mortgagee of Mohmed Albha ended with Respondent No.1 and so far as wife of Bhaiba Sathi namely; Noorbibi is concerned, pending the suit in the year 1963, the petitioners are inducted. Therefore, at least to the extent of 1/3rd share of the land in question in favour of the widow Noorbibi, wife

of Bhaiba Sathi is concerned, the petitioner cannot be said as having been inducted by the mortgagee and consequently entitled to the status of the tenant under the provisions of the Act. He, therefore, submitted that the aforesaid aspects also deserve to be examined. It is not a matter where on the basis of the material available on record the matter can be concluded to the extent of declaration of the status of the petitioner as that of the tenant and, therefore, he submitted that in the order of remand this Court may not interfere.

11. It does appear from the record that even as per the petitioners in the revenue record their names are appearing from 1963 onwards. Further, if the decree was passed in favour of Respondent No.1 for recovery of the amount on 20.10.1956, it will have to be examined as to whether the relationship of mortgagor and mortgagee of Mohmed Albha with Respondent No.1 can be said as ended or not. Further, the decree passed in favour of Noorbibi, widow of Bhaiba Sathi, in any case, if is to operate qua 1/3rd share the mortgage was held as not binding and, therefore,

whether the petitioners can claim status as the persons lawfully inducted by the mortgagee in possession as a tenant or not qua the rights of Noorbibi is an aspect which will be examined by the Mamlatdar and ALT, who is to inquire into the matter after remand. Further, if 1/3rd share is to be excluded, then also the rights of the parties as tenant of the land in question will have to be proportionately examined. Therefore, unless and until all the questions are examined in detail after giving the opportunity to the parties concerned to prove their case, it cannot be concluded that the petitioners are the tenant of the land in question and, therefore, the contention as sought to be canvassed on behalf of the petitioners by Mr.Patel cannot be accepted. In the decision of the Apex Court in case of **"Bechan Pandey and Ors. v. Dulhin Janki Devi and Ors."** (supra) the Apex Court observed that there is unequivocal averments in the written statement and, therefore, there was no valid basis for the Court to proceed otherwise. Such is not the fact situation in the present

case. In case of **"Aswinkumar K. Patel v. Upendra J. Patel"** (supra) the power was exercised by the High Court for remand and, therefore, the observations were made by the Apex Court in light of the provisions of the Order 41 Rule 23 of CPC. In a matter where the lower authority has exercised the power for remanding the case and this Court while examining the matter in its supervisory jurisdiction under Article 227 of the Constitution of India, would stand on a different footing and different consideration than the matter in which the High Court itself is to exercise the appellate power under the Code of Civil Procedure. The scope of appeal, appellate power cannot be equated with the power of this Court under Article 227 of the Constitution. Under the circumstances, both the aforesaid decisions are of no help to the petitioners.

12. In view of the above, the aforesaid observations and discussions, I find that it is not a case for upsetting or interfering with the order

passed by the Dy. Collector in appeal and its confirmation thereof by the Gujarat Revenue Tribunal in revision, whereby the matter is remanded to the Mamlatdar and ALT for proper adjudication. However, as the matter is sufficiently delayed, considering the facts and circumstances, I find that the Mamlatdar and ALT should be directed to decide the matter as early as possible, preferably within a period of six months from the date of receipt of the order of this Court.

13. Rule discharged, subject to direction to decide the matter preferably within six months. Interim relief stands vacated. Considering the facts and circumstances, there shall be no order as to costs.

14. In view of the decision of this Court in the main Special Civil Applications, no relief deserves to be granted at this stage in the Civil applications, except observing that the Mamlatdar and ALT shall be at liberty to pass the consequential order after taking into consideration the factum regarding the exercise

of the power by the Executive Magistrate for the possession of the land in question, including the orders, if any, passed by the Civil Court in the suit being Special Civil Suit No.11 of 2006, which is preferred by the Respondents No.2 to 6 in the Court of Civil Judge (S.D.), Vadodara. Hence, Civil Applications shall stand disposed of accordingly.

7.10.2006 **(Jayant Patel, J.)**

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